No. 84-1176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, OCCIDENTAL CHEMICAL CORPORATION and THE BROOKLYN UNION GAS COMPANY,

Appellees.

On Appeal From the Court of Appeals of the State of New York

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

JOY TANNIAN
Counsel of Record for Appellant
PETER P. GARAM
JOHN D. MCMAHON
CELESTE A. CONTRUCCI
4 Irving Place
New York, New York 10003
(212) 460-2063

BERNARD L. SANOFF
KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN
1345 Avenue of the Americas
New York, New York 10105
Of Counsel

February 1985

TABLE OF AUTHORITIES

No. 84-1176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, OCCIDENTAL CHEMICAL CORPORATION and THE BROOKLYN UNION GAS COMPANY,

Appellees.

On Appeal From the Court of Appeals of the State of New York

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

Appellant, Consolidated Edison Company of New York, Inc. (Con Edison),* submits this brief in opposition to

---

*A listing of Con Edison's parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates is contained in its jurisdictional statement.

the Motion To Dismiss Appeal or Affirm Judgment Below of appellee Public Service Commission of the State of New York (the Commission) and the Motion to Dismiss of appellee Occidental Chemical Corporation (Occidental). Appellant's jurisdictional statement and appellees' motions bring into sharp focus the substantial federal question presented by this appeal. That question is whether Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824a-3 (1982) (169a-75a),* pre-empts the states from requiring electric utilities to pay a higher rate than the maximum rate specified in PURPA for purchases of electric energy from qualifying cogeneration and small power production facilities.

1. Appellees argue that there should be no finding of preemption in this case because Section 210 of PURPA should be viewed as a limited federal intrusion into an area of traditional state concern. Under appellees' view of PURPA, Congress did not intend to deprive states of the power to provide greater encouragement to cogeneration and small power production facilities than that provided by the federal program; under their view, states may require utilities to purchase electric energy from such facilities at a rate in excess of the maximum rate specified in PURPA (Commission's motion, pp. 11-13, 17-18; Occidental's motion, pp. 3-4, 13-14).

Appellees' argument assumes that the states possess authority independent of PURPA to require utilities to purchase electric energy from cogeneration and small power production facilities. However, this assumption is in error. Even the court below was constrained to hold that, under

* Parenthetical references denoted "(— a)" are to the Appendix to Con Edison's jurisdictional statement.

this Court's decisions,* states have no such authority, *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission,* 63 N.Y.2d 424, 438-41 (1984) (1a, 12a-15a), and none of the appellees has appealed from that part of the judgment.

Thus, PURPA cannot be viewed as a carving out of federal authority in an area in which the states have independent authority to act. Rather, PURPA must be viewed as a grant of limited authority to the states in an area in which they previously had no authority to act.** Given this state of the law, one must find in PURPA an express grant of state authority to require purchases in excess of avoided cost, not, as appellees contend, an express prohibition of state authority.***

2. The Commission and Occidental both argue that the states may ignore PURPA's avoided-cost ceiling because this limitation, by its terms, applies only to rules prescribed by the Federal Energy Regulatory Commission (FERC) "under subsection (a) of this section" (Com-

* *New England Power Co.* v. *New Hampshire,* 455 U.S. 331 (1982); *FPC* v. *Florida Power and Light Co.,* 404 U.S. 453, *reh'g denied,* 405 U.S. 948 (1972); *FPC* v. *Southern California Edison Co.,* 376 U.S. 205, *reh'g denied,* 377 U.S. 913 (1964).

** We must look to Section 210 for the scope of that authority. Section 210 contains the limitation, which appellees wish to read out of the statute, that utilities may not be required to purchase electric energy from qualifying cogeneration and small power production facilities at a rate in excess of the utilities' avoided costs.

*** None of the appellees claims that PURPA constitutes a grant of authority to the states to require utilities to purchase electric energy from cogeneration and small power production facilities at rates in excess of avoided cost.

mission's motion, p. 17 n.10; Occidental's motion, pp. 5-6). Appellees' argument is in error.

As we discussed above, when Congress enacted PURPA, its provisions contained the only statutory requirement—federal or state—that utilities purchase the electric energy offered by cogenerators and small power producers. That being so, it was quite logical for Congress to talk about purchase rates fixed "under this section." To argue, as appellees do, that this reference was intended to mean that the states were free to fix rates in excess of these purchase rates makes no sense. Congress was intent on preserving the rights of electric utility customers to just and reasonable rates. Since Congress knew that the states could regulate those rates only because of the enactment of PURPA, it would have been irrational for Congress to establish a ceiling rate in PURPA and then to intend, by enactment of the very same statute, to allow the states to exceed that ceiling rate.

Similarly, there was no need for Congress to make explicit reference to the states in adopting the avoided-cost limitation of Section 210(b) (170a) because Congress knew that any limitation binding on FERC would be binding on the states under the statutory provision requiring the states to implement FERC's rules. Section 210(f) of PURPA (172a-73a).

3. Occidental takes issue with Con Edison's use of PURPA's legislative history as support for Con Edison's position that Congress had an objective that cogeneration and small power production be encouraged without requiring utility customers to subsidize such development (Occidental's motion, pp. 6-7). The legislative history at issue is a sentence in the PURPA Conference Report which states that "[t]he provisions of this section are not intended to require the rate payers of a utility to subsidize

cogenerators or small power producers." *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 98, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7832.

Occidental argues that Congress intended the no-subsidy principle to apply only to rates governing *sales* of electricity by utilities to cogeneration and small power production facilities pursuant to subsection (c) of Section 210 of PURPA (170a-71a) but not to rates governing *purchases* of electricity by utilities from such facilities pursuant to subsection (b) of Section 210 of PURPA (170a) (Occidental's motion, p. 6). Occidental's argument is wrong on several counts.

First, the sentence from the PURPA Conference Report Con Edison relied on refers to the "provisions of this section," by which Congress was referring to Section 210 of PURPA in its entirety; the reference is not limited to "subsection (c)," as Occidental argues. When the PURPA conferees intended to refer to a subsection of Section 210, they used the word "subsection," and when they intended to refer to Section 210 in its entirety, they used the words "this section." *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 97-99, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831-33.

Second, the no-subsidy principle applicable to rates for *sales* is inferred in the PURPA Conference Report from the "not discriminate against the qualifying cogenerators or qualifying small power producers" phrase in subsection

(c).* The same phrase appears in subsection (b) governing rates for *purchases*. Thus, the inferred no-subsidy rule is as applicable to rates for sales as it is to rates for purchases.

Finally, unlike subsection (c), subsection (b) contains explicit authority for the no-subsidy rule in its avoided-cost limitation and in its provision that the rates for purchases "shall be just and reasonable *to the electric consumers of the electric utility*" (emphasis added).

4. The Commission and Occidental both point to a provision in FERC's regulations which permits negotiated agreements providing for purchase rates in excess of avoided cost (Commission's motion, p. 18; Occidental's motion, pp. 11-12). Occidental then argues that

> [i]f utilities and cogenerators can agree to purchase rates *in excess of* avoided costs under PURPA and these costs can be passed through to ratepayers with the consent of the state, *it makes no sense* to

* The PURPA Conference Report states that

> [t]he conferees use the phrase "not discriminate against cogenerators or small power producers" because they were concerned that the electric utility's obligations to purchase and sell under this provision might be circumvented by the charging of unjust and non-cost based rates for power solely to discourage cogeneration or small power production. This phrase should not be construed to permit discrimination against the electric consumers of an electric utility in formulating rates under this provision. The provisions of this section are not intended to require the rate payers of a utility to subsidize cogenerators or small power producers.

Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 98, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7832.

> assert that Congress had barred states from adopting *higher* rates under state programs designed to complement PURPA.

Id. at 12 (first and third emphases added).

This argument will not withstand anaysis. First, acceptance of Occidental's argument would lead to complete repeal of Section 210's avcided-cost limitation. The negotiated rate provision is not limited to "state programs."* If "it makes no sense" to apply the avoided-cost limitation "under state programs" because negotiated rates in excess of avoided costs are permissible, by a parity of reasoning, it would "make[] no sense" to apply the avoided-cost limitation under the "federal program."

Moreover, as the Commission points out (Commission's motion, p. 15), there is no dispute that the states are preempted from prescribing purchase rates which are *lower than* avoided costs. However, the FERC regulation referred to by the Commission and Occidental allows utilities to negotiate purchase contracts at rates *above or below* avoided costs. 18 C.F.R. §292.301(b) (189a). If the Commission and Occidental were correct regarding the effect of the negotiated rate provision on preemption, then there would be no federal premeption whatsoever, and the states would be free to set rates *above or below* avoided costs. Appellees' argument proves too much.

Finally, even if appellees' argument could withstand analysis—which it cannot— a provision in FERC's regulations, for which there is no authorization in PURPA, cannot be allowed to defeat an important Congressional objective reflected in Section 210(b) of PURPA.

* As we discussed in our jurisdictional statement(p. 15), PURPA did not contemplate separate federal and state programs. What PURPA contemplates is a single, cooperative program involving the federal and state governments.

CONCLUSION

For the reasons stated in our jurisdictional statement and in this brief, probable jurisdiction should be noted.

Respectfully submitted,

JOY TANNIAN
Counsel of Record for Appellant
PETER P. GARAM
JOHN D. MCMAHON
CELESTE A. CONTRUCCI
4 Irving Place
New York, New York 10003
(212) 460-2063

BERNARD L. SANOFF
KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN
1345 Avenue of the Americas
New York, New York 10105
Of Counsel

February 1985